

MAR 10 2006*Wick v. Barnhart*, No. 04-35579.

BEA, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent. Because the record contained “affirmative evidence of malingering” and the ALJ made specific findings as to why Wick was not credible, we must defer to the ALJ’s decision to discredit Wick’s testimony. Because the ALJ permissibly discredited Wick’s testimony, and because Wick’s treating psychiatrist found no mental impairment that would affect Wick’s ability to work, the ALJ did not err in failing to consider Wick’s purported psychological and psychiatric limitations at any step in the sequential disability analysis.

I.

The logical implication of the majority memorandum disposition is that, absent a medical expert’s express opinion that a claimant is a malingerer, an ALJ lacks “affirmative evidence of malingering.” None of our cases, however, establishes so stringent a rule. Rather, we must uphold an ALJ’s findings when they are supported by inferences reasonably drawn from the record. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001) (“Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Where the evidence is susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.” (internal quotation marks and citations omitted)).

Here, the ALJ knew from Dr. Schroeder’s report that Wick had displayed at least one positive Waddell sign. Given that not a single one of Wick’s numerous doctors diagnosed Wick with any psychological condition that could cause low-back pain—certainly Wick’s claimed depression cannot have had such an effect—there was no reason for the ALJ to consider a positive Waddell sign in Wick’s case as anything other than evidence of malingering. Moreover, the ALJ was entitled to treat a single positive Waddell sign as evidence of malingering. Admittedly, were the ALJ an orthopaedist diagnosing the source of Wick’s low-back pain, only three or more positive Waddell signs would be “clinically significant.” Waddell, *supra*, at 118. Clinical significance, however, is not the touchstone here. The ALJ was not a clinician but an arbiter charged with assessing Wick’s credibility by evaluating the record as a whole, observing Wick’s demeanor, and exercising judgment. Wick’s positive compression test indicated that she had claimed to experience low-back pain from an action that could not possibly have caused such pain.¹ As an arbiter and not a clinician, the ALJ was

¹In a compression or “axial loading” test, the examiner places pressure on the standing patient’s skull. If the patient reports low-back pain, the Waddell sign is positive. Waddell, *supra*, at 118.

entitled to interpret this fact as affirmative evidence of malingering.²

Because the record contained affirmative evidence of malingering, the ALJ was required to give only “specific”—not “clear and convincing”—reasons for discrediting Wick’s testimony. *See Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). Thus, the ALJ adequately justified discrediting Wick’s testimony by providing a detailed review of the abundant objective medical evidence tending to contradict Wick’s allegations of pain.

II.

In social security cases, “[t]he opinions of treating physicians are given greater weight than those of examining but non-treating physicians or physicians who only review the record.” *Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1036 (9th Cir. 2003). An ALJ may reject the opinion of a treating physician in favor of the opinions of consulting or examining physicians only for “specific and legitimate” reasons supported by substantial evidence. *Lester*, 81 F.3d at 830.

²In deciding that the ALJ lacked affirmative evidence of malingering, the majority memorandum disposition places great weight on Dr. Schroeder’s various diagnoses of Wick’s physical problems. The references to Dr. Schroeder’s report, however, are incomplete. Dr. Schroeder indicated that the problems diagnosed were “unrelated” to the motor vehicle accident that Wick claimed was the basis for her neck and low-back pain. Thus, the diagnoses that the majority memorandum disposition emphasizes in no way undermine the ALJ’s interpretation of Dr. Schroeder’s report as containing affirmative evidence of malingering.

Here, Wick's treating psychiatrist, Dr. Strgar, opined that Wick had no "significant psychological or psychiatric impairment" bearing on her capacity for work. This opinion is consistent with notes Dr. Strgar made during three different visits with Wick during 1999 and 2000, in which he indicated that Wick was responding well under treatment with Effexor. Drs. Van der Lindt, Sjodin, and McConochie were all non-treating physicians who assessed Wick's mental health according to her own statements. Given that the ALJ permissibly discredited Wick and that the opinions of treating physicians are entitled to greater weight than the opinions of non-treating physicians, the ALJ need not have rejected Dr. Strgar's opinion in favor of the arguably conflicting opinions of Drs. Van der Lindt, Sjodin, and McConochie.

For these reasons, I would not require the ALJ to consider the effects of Wick's purported mental disorders at any step of the sequential disability analysis. I would affirm the Commissioner's denial of benefits.